Supreme Court, U.S.
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No. 91-7

In The

Supreme Court of the United States

October Term, 1991

RICHARDSON ENGINEERING COMPANY,

Petitioner,

vs.

WILLIAM L. CROW CONSTRUCTION COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF TO BRIEF IN OPPOSITION

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APPELLANT'S REPLY BRIEF

Appellant Richardson Engineering Company ("RECO") respectfully calls this Court's attention to the fact that a number of issues first raised in Respondent William L. Crow Construction Company's ("Crow") Brief in Opposition underscore the reasons that Appellant's case is worthy of review by this Court.

STATEMENT

The First Petition

The First Petition filed on June 26, 1989, sought review of the merits of the dispute between RECO and Crow. Following a trial, RECO filed a Petition for Certiorari hoping to obtain a new trial. *Richardson Engineering Company vs. Crow Construction Company,* No. 88-2093 (U.S. July 16, 1989). The petition was denied.

RECO did seek a review of Judge Coffrin's rulings by the Second Circuit and by this Court well before it learned of the appearance of conflict of interest on the part of Judge Coffrin. The First Petition dealt with two primary issues. One was Judge Coffrin's refusal to allow RECO's expert witness to testify as to the value of acceleration damages due from Crow to RECO. The jury had found that RECO was entitled to said damages but by not allowing the expert to testify, RECO was not permitted to prove the value of its damages. The second issue was Judge Coffrin's award of $1,247,000 of attorney's fees to Crow against RECO which dwarfed the judgment of $546,375.00 for Crow's completion costs.

On appeal, the Second Circuit found that they would not overturn Judge Coffrin's rulings because they were within his "sound discretion". However, neither this Court nor the Second Circuit, nor this Appellant knew at the time that Judge Coffrin made his decisions, that his "sound discretion" was compromised and colored by his undisclosed relationship with John Opel, the Chief Executive Officer of IBM.

The Instant Petition

The second petition, filed the 28th of June, 1991, sought review of denial of Appellant's Rule 60(b)6 Motion for Relief of Judgment Order. Appellant had moved for a new trial relying upon 28 U.S.C. § 455(a) on the basis that Judge Coffrin's relationship with John Opel, President and CEO of IBM, created an appearance of impropriety because IBM had a substantial interest in the outcome of the case.

Upon appeal, before the Second Circuit, appellant moved to disqualify any judge who was a shareholder of IBM. The motion was denied. Both Judge Timbers and Judge Cardamone, are stockholders in IBM. A large portion of the oral argument before the three-judge panel consisting of Judge Cardamone, Judge Timbers and Judge Meskill dealt with the question as to whether IBM was a party of interest having a substantial interest in this case. Appellant respectfully submits that substantial stockholders in IBM, such as Judge Timbers and Judge Cardamone, must under 28 U.S.C. § 455(a) and (b), recuse themselves from sitting on such a panel.

REASONS THE PETITION SHOULD BE GRANTED

Appellant has moved for a new trial because Judge Coffrin's relationship with John Opel, the President and CEO of IBM, creates an appearance of impropriety requiring a new trial. John Opel was the President and CEO of IBM at all relevant times. IBM has a substantial interest in the outcome of this case for the reasons set forth in appellant's petition of June 28, 1991.

After the first trial ended in a mistrial, Judge Coffrin barred IBM employees from sitting on the jury at the second trial. He did not disclose, however, that he had just returned from a Florida vacation with John Opel and his family a few days before he presided at the second trial which opened on February 8, 1988. Additionally, John Opel's son, Robert Opel, clerked in Judge Coffrin's Court at times during the pendency of this suit. Despite these close associations, Judge Coffrin never disclosed to RECO those associations and RECO was not aware of them until after judgment had been entered.

Actually, the first time that RECO learned of the appearance of conflict of interest was in February, 1990. At that time, RECO received a letter from Mr. Robert Opel's lawfirm (40a). The letter stated that Mr. Robert Opel had a conflict of interest in representing RECO because he was Judge Coffrin's law clerk when the case was before Judge Coffrin and that Mr. Robert Opel was the son of John Opel the former CEO of IBM.

Appellee's Brief in Opposition decries RECO's assertions about Judge Coffrin's relationship with the Opels as "personal conjecture" and "surmize" and "immaginings". However, Judge Coffrin, in his order of September 10,

1990, states that this case was assigned to the magistrate for all pretrial matters from July 13, 1982 to February 21, 1986, and therefore, the matter of Robert Opel's status was never an issue. However, a review of the record reveals the judge is in error and that it was before him on at least three occasions during this period. These occasions include:

(1) Footnote 8 of the Order (16(a)) discloses that the presiding "judge exercised his discretion in permitting a change in the location of the deposition." This decision of Judge Coffrin occurred September 7, 1984.

(2) On February 7, 1985, Judge Coffrin issued a 13-page Opinion and Order granting Defendant's Motion for a Jury Trial.

(3) There was extensive correspondence about the case between Judge Coffrin and the parties between July 13, 1982 and February 21, 1986.

It is noteworthy that at no time was there any disclosure by Judge Coffrin of his association with the Opel family. This sets this case apart from almost all cases dealing with the issue of recusal by a judge. In *In re Allied Signal, Inc.*, 891 F.2d 967 (1st Cir. 1989), there had been disclosure and wide-spread newspaper publicity about the appearance of conflicts by the law clerks. The Court found that in determining the appropriateness of a judge's disqualification due to the appearance of partiality, the party's own words and deeds may help determine the extent to which a knowledgeable observer would see a sign of partiality in a particular circumstance. The parties lack of objections for more than two

years to the judicial clerk's sibling relationship with lawyers representing plaintiffs in a highly complex mass tort litigation supported a conclusion that a knowledgeable objective observer would not have seen a significant indication of partiality in the sibling relationship. No such circumstances were present here. In *In re Beard*, 811 F.2d 818 (4th Cir. 1987), is clearly distinguishable from the case at bar because the relationship involved was that of a neighbor. A joint Florida vacation is certainly a more intimate association than merely being a neighbor. Furthermore, in *In re Beard Supra*, the meetings and relationship attributed to the judge were all disclosed prior to the meetings and were consented to by all the parties involved. In *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1306 (2d. Cir. 1988), cert denied, 491 U.S. 1102 (1989), again the appearance of conflict had been fully disclosed and known to Drexel Burnham and went unchallenged.

The test developed by the Courts to determine whether an appearance of impartiality exists is whether a reasonable person viewing the facts objectively would doubt the judge's impartiality. In *In re Drexel Burnham Lambert Inc., Supra*. The First Circuit Court of Appeals has provided some guidance:

> "The 1974 Amendment to 28 U.S.C. 445 changed the standard for recusal from a subjective one, which left the judge "in his opinion" the decision whether it would be improper to sit, 28 USC 445 (1970) to the present objective standard requiring disqualification whenever the judges impartially "might reasonably be questioned".
>
> The proper test, it has been held is whether the charge of lack of impartiality is grounded on

> facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even necessarily in the mind of the litigant filing the motion under 28 USC 445, but rather in the mind of the "reasonable man."
>
> *United States v. Cowden,* 545 F.2d 257, 245 (1st Cir. 1976) (citing *Parrish v. Board of Commissioners of Alabama State Bar,* 524 F.2d 98, 103 (5th Cir. 1975).

It has been found that:

"The goal of 445 is to avoid even the appearance of partiality. If it would appear to a reasonable person that judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exist because the judge actually has no interest in the case or because the judge is pure in heart and uncorruptable. The Judge's forgetfulness, however, is not the sort of objectively ascertainable fact that can avoid the appearance of partiality. *"Hall v. Small Business Administration* 695 F.2d 175, 179 (5th Cir. 1983). Under Section 455(a) therefore "recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances would expect that the judge would have actual knowledge." *Liljeberg vs. Health Services Acquisition Corp,.* 486 U.S. 847, 100 L. Ed. 2d 855, 108 S. Ct. 2194 (1987).

Clearly the purpose and goal of 28 U.S.C. 445 is to foster the appearance of impartiality:

> "Because 28 U.S.C. 455 (a) focuses on the appearance of impartiality, as opposed to the

> existence in fact of any bias of prejudice, a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street." *Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980) Cert. den. 449 U.S. 820, 101 S.Ct. 78, 66. L. Ed. 2d 22.

Any reasonable person knowing that the presiding judge in a multimillion dollar lawsuit who vacationed just prior to trial in Florida, with the CEO of a non party whose company has a stake in the outcome of the trial of millions of dollars, would reasonably question the impartiality of the judge. Moreover any reasonable person would further doubt the impartiality of the judge who had employed the son of the same CEO as his law clerk during the pendency of the case, and who had granted a mistrial at the first trial prior to his Florida vacation, because employees of the CEO's company had been placed on the Jury by the judge over the oral and written objections of RECO.

The issue in this case then is quite clear. A reasonable person would find that IBM did have a substantial interest in the outcome of the case. A reasonable person would further find that Judge Coffrin and John Opel, the President and Chairman of the Board and CEO of IBM, had more than a casual relationship and they and their families vacationed together in Florida shortly before the second trial. A reasonable person therefore would find that Judge Coffrin, under 28 USC § 455(a) should have recused himself.

Furthermore, the reasonable person, knowing that Judge Cardamone and Judge Timbers and/or their

spouses were shareholders of IBM stock, and knowing that a threshold question in the case was whether IBM did have a substantial interest in the outcome of the case, would find that Judges Cardamone and Timbers should have recused themselves. Because the impartiality of the judiciary is of exceptional importance, granting of a Writ of Certiorari is appropriate. Upon rehearing, RECO should be awarded a new trial.

CONCLUSION

For the reasons discussed herein, RECO respectfully requests that the Petition for Certiorari be granted.

Respectfully submitted,

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